STATE OF MICHIGAN
IN THE SUPREME COURT

JUSTINE MALDONADO,

Plaintiff-Appellee/
Cross-Appellant,

-vs-

FORD MOTOR COMPANY,

Defendant-Appellant/
Cross-Appellee.

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Sup. Ct. No. 126274
Ct. of Appeals No. 243763
Wayne Cir. Ct. No. 00-018619-NO

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PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF IN OPPOSITION TO THE APPLICATION FOR LEAVE TO APPEAL

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I

Did the circuit court err in dismissing this case for extrajudicial statements by plaintiff, by her counsel, or by third parties, where there is no evidence that any of those statements violated any applicable standard of conduct?

The Court of Appeals did not address the question.

The circuit court answered "No."

The plaintiff answers "Yes."

The defendant Ford Motor Company answers "No."

II

Did the Court of Appeals properly determine that the circuit court abused its discretion in dismissing this case based upon extrajudicial statements by the plaintiff or her attorneys under a standard that was unconstitutionally vague?

The Court of Appeals answers "Yes."

The circuit court answered "No."

The plaintiff answers "Yes."

The defendant Ford Motor Company does not address the question.

III

Did the Court of Appeals properly determine that the circuit court abused its discretion by dismissing this case based upon extrajudicial statements by the plaintiff or her attorneys without conducting a hearing or making any finding on whether those statements had prejudiced Ford's right to a fair trial in any way?

The Court of Appeals answers "Yes."

The circuit court answered "No."

The plaintiff answers "Yes."

The defendant Ford Motor Company answers "No."

IV

Did the Court of Appeals properly find that the circuit court had abused its discretion when it excluded evidence establishing that Ford had known of and done nothing about sexual harassment that Daniel Bennett, a superintendent for Ford, had perpetrated upon five other employees at the Wixom plant because that evidence was probative of the hostility of the environment in which Maldonado worked and of Ford's respondeat superior liability for that environment?

The Court of Appeals answered "Yes."

The circuit court answered "No."

The plaintiff answers "Yes."

The defendant Ford Motor Company answers "No."

V

In the event that this Court should accept review on the evidentiary issues, did the circuit court abuse its discretion by excluding evidence establishing that Ford had known of and done nothing about sexual harassment that Daniel Bennett, a superintendent for Ford, had perpetrated upon five other employees at the Wixom plant when that evidence was offered for other purposes?

The Court of Appeals did not reach the issue.

The circuit court answered "No."

The plaintiff answers "Yes."

The defendant Ford Motor Company answers "No."

VI

Did the Court of Appeals improperly refuse to reverse the circuit court's order excluding evidence that Ford had known of and done nothing about the fact that Daniel Bennett, a superintendent for Ford, had used Ford's car to stalk and expose himself to three high-school girls while test driving the car on I-275?

The Court of Appeals majority answered "No."

Judge Helene White answered "Yes" and remanded this issue for reconsideration.

The circuit court answered "No." The plaintiff answers "Yes."

The defendant Ford Motor Company answers "No."

INTRODUCTION

On January 28, 2001, the *New York Times* published on the first page of its business section an extensive article about Ford Motor Company's response to complaints of sexual harassment at a number of its Detroit-area plants (Mald. Apx, Ex E).

As the *Times* recognized by the placement and size of its article, with up to a quarter of the workforce in these plants now composed of women, the issue that its article addressed was of great importance for American industry—and for the American public. As the *Times* article recognized by focusing on the Maldonado case, this case presents that issue in a particularly clear way.

Between January 2001 and July 2002, the state and local media made essentially the same judgment as the *New York Times*, covering this case on approximately twenty different occasions (Ford Apx, Ex N, Tr. 7/2/202, at 6-9; Mald. Apx, Ex E).

Despite Ford's suggestion to the contrary, there is nothing unusual or sinister about that. As the United States Supreme Court has recognized, from the time that John Adams defended the British soldiers accused of shooting into the crowd in the Boston Massacre, there have been court cases that have raised issues that transcended the courtroom and become part of a larger public debate. See *Nebraska Press Association v Stuart*, 427 US 539, 547-548 (1976). In such cases, the public record of the case—including evidence excluded from the trial of that case—becomes part of the record for the larger public debate. *Id.*

There are obviously many cases that have received far greater publicity—and that have far more importance—than the instant case. Nevertheless, this case is one like those described in *Nebraska Press Association*—it is a case that is part of public debate over a

civil rights issue and thus has within it the question of the relationship between the right to a fair trial and the right to free speech, press, and assembly.

In response to this Court's request for supplemental briefs, the plaintiff, of course, reviewed the briefs that had been filed. None, including the initial brief filed by the plaintiff, addressed that issue adequately.[1]

Ford's briefs attempted to defend the decision of the circuit court under the standards for deciding what the court might do when a party abused the discovery process, intimidated witnesses, suborned perjury, or engaged in similar conduct far removed from the First Amendment. As set forth in the plaintiff's initial brief, the substantive standards and the procedures set forth in the cases cited by Ford have little, if any, relevance to the issues at hand here.

The plaintiff's initial brief did address the First Amendment issues—but it did not fully explicate the precedents and the issues at stake. The plaintiff, therefore, submits this brief as a more complete statement of the law—and of her position that the circuit court levied an unconstitutional punishment upon her for speech that was protected by the First Amendment to the Constitution of the United States.

Before addressing those issues, the plaintiff must address the issue of the tone of Ford's various briefs. Repeatedly, Ford accuses plaintiff or her counsel of "flagrant and abusive misconduct," "tampering with the administration of justice," "boundless dissembling," and the like. None of these charges are true—indeed, the Attorney

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[1] The plaintiff rests on the description of the facts regarding sexual harassment at Wixom and her argument on the evidence issues contained in her initial brief. As there set forth, unanimous precedent and sound logic support the Court of Appeals' unanimous decision on the evidence issues—with he exception of the issues raised in the cross application, which remains pending.

Grievance Commission has found that the charges of misconduct do not even merit a hearing. Moreover, a close review of the record that Ford cites in support of its various charges of dissembling suggests that the shoe fits on the other foot.

But even though the plaintiff and her counsel take strong exception to Ford's rhetoric, other than the observation just made, they do not respond in kind, because that rhetoric does not advance the debate over what are serious issues.

What Ford asks this Court to do is in fact extremely serious. It asks this Court to prevent any jury from ever deciding whether Ford tolerated sexual abuse as serious as that Maldonado has described. It asks this Court to take that step based on the plaintiff's assertion of her right and that of her attorneys and supporters to speak out about that abuse in the larger public debate that her case has sparked over whether the civil rights acts are being implemented and enforced. It asks this Court to turn the balanced and limited proscriptions that Rule 3.6 of the Michigan Rules of Professional Conduct imposes upon some statements by attorneys into an all-purpose ban on speech by plaintiffs, by their attorneys, and by their supporters. There is no precedent from any jurisdiction that supports that request—or the circuit court's decision.

Finally, the fact that the plaintiff concedes the importance of the issue does not mean that the plaintiff agrees that this Court should grant the application for leave to appeal. As will be seen, the circuit court departed so far from the substantive and procedural protections for speech established by six decades of Supreme Court precedent that there is no issue for this Court to decide. The circuit court did not employ the proper standards; it did not ask the right questions; and it did not compile the proper record. If this Court wishes to address the relationship between free speech and a fair trial, there

will be other cases where the circuit court has issued an order or otherwise taken the steps that will present such issues in a manner deserving of this Court's attention.

Insofar as Ford's application is concerned, this Court should deny leave—or it should summarily remand this matter for trial.

As Judge White held in her concurrence, there was no violation of any order and, even if there had been, no prejudice can possibly exist two years after the acts of which Ford complains.

Indeed, the plaintiff submits, remand for trial is required under the holding of the majority of the Court of Appeals. That majority rightly held that the circuit court had punished speech under an unconstitutionally vague standard. If that is so, and it obviously is, no hearing that the circuit court can now conduct will ever change the fact that it never complied with the constitutional mandate of establishing beforehand a narrowly-tailored and precise standard setting forth which speech was permitted and which was prohibited. As that vagueness is fatal to any punishment that the circuit court might seek to levy, this matter should simply be remanded for trial.

STATEMENT OF FACTS

In the two briefs that they have filed in this Court, the defendants have never attempted to comply with the mandates of MRC 7.302(d) and 7.212(c)(6) by setting forth a fair statement of the material facts described without "argument or bias." As will be seen, the error is crucial, for the facts, fairly stated, demonstrate that there was no error in the decision by the Court of Appeals to reverse the circuit court order dismissing this case.

The plaintiff accordingly begins this brief with a statement of the facts regarding the pretrial publicity. Those facts were contained in the record that the defendants compiled on July 8 and 9, 2002. The defendants submitted nineteen exhibits, including fifteen media accounts, one flier, one press release and two photographs (Ford Apx, Ex N, Tr. 7/9/2002, 6-9; Ford Apx Ex's E, H, J, L). The defendants called no witnesses and offered no testimony.[2]

A. The facts regarding the publicity in this case.

The January 28, 2001, article in the *New York Times* described the sexual harassment at Wixom and, in that context, discussed Bennett's conviction and the facts underlying it (Mald. Apx, Ex E). At that time, these were indisputably public records on file at the 35th District Court and at the Wixom and Michigan State Police Departments.[3] Indeed, but for a fire at the 35th District Court, the transcript of the trial at which Bennett was convicted would remain part of the public record today.

Perhaps recognizing the public nature of these documents, the defendants filed no objections with Judge MacDonald or with the plaintiff's attorneys over the *New York Times* article or any statements or information contained in it—nor did they seek any

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[2] The defendant wrongly attempted to supplement the factual record with "evidence" from supposedly "well-documented web sites" (Ford Reply Br, at 4, n. 5) and with "exhibits" taken from the web that were not before the circuit court (see Ford Apx, Ex's V-Y). All of this should be stricken. None of it is authenticated, relevant or admissible; much of it concerns conferences and events that occurred after the circuit court's order; and all of it together amounts to no more than a claim that plaintiff's attorneys have represented, spoken at, or been described as attorneys or "national organizers" for the By Any Means Necessary Coalition, a coalition which did not publish any fliers or make any of the statements that Ford has cited as grounds for dismissing this case.

[3] Plaintiff's counsel obtained the record of the conviction and the Michigan State and Wixom police reports from FOIA requests filed with those agencies.

order prohibiting any comment by the plaintiff or her attorneys about the content of those records.

The defendants did, however, move early in this litigation to exclude evidence of that Bennett had exposed himself to the high-school girls while driving a Ford car and that he had been convicted of that crime. In response to that motion, the plaintiff filed copies of the police report and the record of the conviction with the circuit court (R. 101, Pl. Ans to Jt Motion in Limine, Ex's 6, 7).

After public hearings in which the evidence was fully disclosed, on February 16, 2001, Judge Kathleen MacDonald entered a joint order in this case and in *Elezovic v Ford*, Sup Ct No. 125166, excluding from the trial of both cases the evidence of what Bennett did and of his conviction—but stating on the record that she might reconsider that issue at a later time if it turned out that the evidence was needed and could be introduced without what she saw as undue prejudice (Tr 1/19/2002, 7).

The plaintiff filed an application for leave to appeal from that Order to the Court of Appeals, which was denied by that Court on July 2, 2001, with Judge Hood dissenting, and to this Court, which was denied on April 2, 2002, with Justice Kelly dissenting (Ct App No 233449; Sup Ct No. 119753). In the course of those applications, Bennett's conviction and the police reports setting forth the facts that led to that conviction became part of the public record in the Court of Appeals and the Supreme Court (Ct App No. 233449, Appl. Lv, Ex's 6,7; Sup Ct No. 119753 Appl. Lv, Ex's 6,7). Neither Ford nor Mr. Bennett sought an order in the Wayne County Circuit Court, the Court of Appeals or the Supreme Court to seal those records—or to prohibit the plaintiff or her attorneys from commenting publicly on those records or the facts contained in them.

After the *Elezovic* jury had been discharged in August 2001, Ms. Maldonado's attorneys issued a press release early in the morning on September 11, 2001, announcing a press conference at which the three women would announce the filing of two new cases against Bennett and Ford and the filing of a motion to disqualify Judge MacDonald (Ford Apx, Ex E). The press release included a detailed summary of the evidence contained in the public record regarding sexual harassment at Wixom, including Bennett's conviction and what he had done to the young women on I-275 (Ford Apx, Ex E). It described Judge MacDonald's rulings excluding the I-275 evidence and the testimony of Pamela Perez as part of a "coverup" of the problem of sexual harassment (Ford Apx, Ex E, para 3).

The press release said that Maldonado's case "will be going to trial soon." (Ford Apx, Ex E, para 3). While *Maldonado* was approaching readiness for trial, no trial date had yet been set. Nor was one set before January 2002, until well after Judge MacDonald transferred to the Family Division and Judge William Giovan took over the *Maldonado* case.

The September 11 press conference was cancelled due to the terrorist attacks that occurred after the press release had been issued. But the press release itself resulted in a story on the Associated Press wire, which ran in one edition of the *Detroit Free Press* on September 13, 2001 (Ford Apx, Ex N, Tr 7/9/2002, 6-7). The article contained references to Bennett's conviction. Again, the defendants registered no objection of any kind with Judge MacDonald or with the plaintiffs' attorneys to that article or any statement in it.

In October 2001, the three plaintiffs and their attorneys held the postponed press conference about the *Maldonado, Perez* and *McClements*[4] cases, resulting in stories carried on the AP and UPI wires and published in the *Oakland Press* (October 11, 2001) and on some television stations. Several of those stories contained references to Bennett's conviction and to the facts underlying that conviction (Ford Apx, Ex N, Tr. 7/9/2002, 6-7). Once again, neither Bennett nor Ford made any protest over those stories to Judge MacDonald or to the plaintiff or her attorneys—nor did they seek any protective order limiting public comments.

Unknown to the plaintiffs in any of these cases, on November 9, 2001, Mr. Bennett appeared with his attorney at the 35th district court and represented that he had been a model citizen and was entitled to an expungement. The 35th District Court, without knowing of the pending cases against Bennett, granted that expungement.

After this case was reassigned to the Honorable William Giovan on February 4, 2002, the circuit court set a July 8, 2002 trial date. On May 17, Judge Giovan conducted a hearing on Ford's motion to exclude from the trial the testimony of all of the other women whom Bennett had sexually harassed at Wixom. The plaintiff's attorneys had advised the press of this hearing—and at least one station filed a request to televise the proceedings. Judge Giovan denied that request—but, contrary to statements in the defendants' earlier brief, Judge Giovan did *not* close the hearing to the media. Several reporters sat in on it (Ford App, at 6; Tr. 5/17/2002, at 1).

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[4] *McClements v Ford Motor Company*, Ct App No. 243764, *lv. granted* Sup Ct No. 126276; *Perez v Ford Motor Company*, Wayne Cir Ct No. 01-134649-CL, Ct App No. 249737

In chambers before that hearing, Mr. Bennett's attorney asked for a gag order. No record was requested or made of that conference. In general, however, Mr. Bennett's attorney asserted that the expungement statute, MCL 780.623(5), made it a crime to mention that Bennett had been convicted or what he had done that resulted in that conviction. The plaintiff's counsel objected, stating that if so construed, the expungement statute would be unconstitutional and that the plaintiff believed she had a right to speak about the conviction. Judge Giovan did not grant the informal request for a gag order—nor did he express on or off the record any opinion as to the proper construction or the constitutionality of the statute. Neither Ford nor Bennett followed up with any formal motion for a gag order based on that statute or on any other authority.

After the May 17 hearing, the plaintiff, counsel for the plaintiff, and counsel for both defendants spoke with the media. Some of the press accounts made reference to Bennett's conviction—but none quoted any statements from plaintiff's counsel about that conviction. Whether the media obtained that information from comments by plaintiff's counsel, from observation of the court proceedings, from documents that had long been on file in various courts, or from all three sources was not clear (Ford Apx, Ex N, Tr. 7/9/2002, 7). Once again, however, the defendants sought no protective order.

On May 28, 2002, and June 1, 2002, the plaintiff and one of her attorneys spoke, respectively, at a public meeting in Detroit chaired by the Honorable John Conyers, and at a conference of the By Any Means Necessary (BAMN) Coalition in Ann Arbor (Ford Apx, Ex G). The defendants have offered no evidence that any representative of the media was present at either event—and, as far plaintiff's counsel is aware, none were. There is no claim that any remarks were recorded in the media from either event.

In mid June, the *Metro Times* published a lengthy cover story on the harassment at Wixom, covering all of the cases, including, but not limited to, the cases filed by Maldonado, Perez, McClements, and Elezovic (*Metro Times*, "Harassment factory," June 12-18, 2002). The article contained references to Bennett's conviction and, citing the police report, summarized the facts that gave rise to that conviction (Ford Apx, Ex H). It quotes one of Maldonado's attorneys as saying there were fifty sexual harassment complaints at Wixom, but that he could not release the details as those were covered by a protective order. It says Ford's defense is that Maldonado is an "overweight opportunist who is colluding with co-workers to make a fortune" by falsely accusing Bennett and Ford (Ford Apx, Ex H).

On June 21, 2002, the circuit court conducted further hearings open to the public and the press. In the middle of a discussion of whether Mr. Bennett was to appear for another deposition, Mr. Bennett's attorney said that his client had refused to appear for a deposition at a previously scheduled time because he was so upset about an article that had appeared in the *Metro Times* about the harassment at Wixom (Ford Apx, Ex R, Tr. 6/21, at 28-29). Judge Giovan volunteered that he had heard that the article "made a fair presentation," and inquired whether counsel were speaking to the media (Ford Apx, Ex R, Tr 6/21, at 29-30). The Court then made the following statement:

> I'm not making any decisions about this, but I'm going to tell you one thing. If I ever reach the conclusion that somebody is violating that ethical obligation and causing some difficulty in our getting a fair jury, I will dismiss the case with prejudice, or, and I should say, on the other side, grant a default judgment. I just want everyone to know that. And then whatever counsel is involved can answer to their client.
>
> (Ford Apx, Ex R, Tr. 6/21, at 30)

Apart from that statement, the circuit court issued no order, and, indeed, later said that the statement itself was not even a "ruling" (Ford Apx, Ex M, Tr. 7/8, 104).

The defendants nevertheless quickly followed up that comment with attempts to gather evidence in support of a planned motion to dismiss. At a deposition on June 24, Mr. Bennett's attorney interrogated Ms. Maldonado about whom she had told of Bennett's conviction. Ms. Maldonado testified that she had told hundreds of people and that she would post it on the Internet if she knew how (Ford Apx, Ex I, Dep of Maldonado, 981-987).

On June 25 and 26, respectively, people who were neither parties nor attorneys distributed leaflets from the Justice for Justine Committee at the Wixom plant and a demonstration at Ford World Headquarters in Dearborn. Both events were entirely peaceful and lawful, and they ended without incident. The leaflet that was passed out referred to Bennett's conviction and described the events underlying that conviction, as well as other acts of sexual harassment by Bennett. The leaflet accused Judge Giovan of being "in Ford's pocket" and of "trying to gag the victims of sexual harassment and their lawyers" and asked the public to come to the trial. It contained no statements from any counsel (Ford Apx, Ex L).

At Ford World Headquarters on June 26, one of the plaintiff's attorneys, Jodi-Marie Masley, was present. She made no statements, passed out no leaflets, and did not identify herself as an attorney. Other than standing, at times, next to her client (Ford Apx, Ex K), there is no evidence that Ms. Masley did anything other than join the assembled protest.

On June 28, however, the defendants filed a motion to dismiss the case based on allegations of misconduct by the plaintiff and her attorneys. At hearings on that motion on July 9, Ford's attorney introduced the media accounts, press release, and leaflet described above (Ford Apx, Ex N, Tr 7/8, at 6-8). During a discussion of the leaflets, Attorney Masley, representing the plaintiff, described the motion as "twelve pages of tripe," because the motion said that "...workers in Ford Wixom can't distribute leaflets to each other on non-work time and non-work areas" and that "people who are members of the public can't distribute leaflets in public" (Ford Apx, Ex N, Tr 7/8, at 98).

Ms. Masley made clear on repeated occasions that neither she nor any of Ms. Maldonado's other attorneys had written, passed out, or encouraged the passing out of the leaflets (Ford Apx, Ex N, Tr 7/8, at 98, 102, 111-113). Finally, Judge Giovan asked Ford's attorneys if they had "any evidence to the contrary" (Ford Apx, Ex N, Tr 7/8, at 113)—and, after extended speculation about the membership of the Justice for Justine Committee, Ford's attorney admitted that the company had no evidence that either Ms. Maldonado or her attorneys had written, produced, or distributed any of the leaflets at Dearborn or in Wixom, as indeed they had not (Ford Apx, Ex N, Tr 7/8, at 115).

B. The opinion of the circuit court.

On August 21, 2002, the circuit court issued its opinion and order granting the defendants' motion and dismissing the case with prejudice on the grounds that the plaintiff and her attorneys had purportedly violated Rule 3.6 of the Michigan Rules of Professional Conduct.

The circuit court started by citing Ms. Maldonado's deposition testimony that she had told hundreds of persons about the conviction (Ford Apx, Ex B, Cir Ct Op, at 3-5).

Without finding that Ms. Maldonado either wrote or distributed the flier at Ford World Headquarters, the circuit court then held her responsible for what it called the "broadcast of the proscribed material" (Ford apx, Ex B, Cir Ct Op, at 6). The Court concluded that even though Ms. Maldonado was not an attorney, she had violated Rule 3.6 because she was the principal of her attorneys and thus bound by the rules that governed those attorneys (Ford Apx, Ex B, Cir. Ct Op, at 6-7).

The circuit court then turned to plaintiff's counsel. It found that they had violated Rule 3.6 by the press release of September 11, 2001 (Ford Apx, Ex B, Cir Ct Op, at 7). Without finding that the plaintiff's attorneys made any extrajudicial statements about Bennett's conviction after that date, the circuit court found that media reporters invited to court hearings by the plaintiff's counsel had mentioned the conviction in their accounts and that plaintiff's counsel had been quoted in articles or broadcasts that had made reference to the conviction (Ford Apx, Ex B, Cir Ct Op, at 7-8).

After stating that Ms. Masley had the right to attend the June 26 demonstration and that she was not responsible for what others may have done there, the circuit court then found her responsible for the fliers because the Justice for Justine Committee "seems to be intimately connected with the plaintiff" and, "at a minimum," neither the plaintiff nor her counsel attempted to dissuade the Committee from distributing the fliers in question (Ford Apx, Ex B, Cir Ct Op, at 8). The circuit court further held plaintiff's counsel responsible for the Metro Times article on the basis that the plaintiff's attorneys had provided the reporter with the information about Mr. Bennett's conviction and the underlying behavior (Ford Apx, Ex B, Cir Ct Op, at 8).

Finding that there was no "genuine question" that the court had the power to dismiss the case based on what it called "serious misconduct," the circuit court held that it would dismiss the case without regard to whether there had been any prejudice created by the words or actions of the plaintiff or her attorneys (Ford Apx, Ex B, Cir Ct Op, at 12).

C. The decision of the Court of Appeals.

On April 22, 2004, the Court of Appeals unanimously reversed the circuit court's order dismissing this case.

The Court of Appeals held that the circuit court had the "inherent authority" to dismiss a case based on misconduct by counsel (Ford Apx, Ex A, Ct App Op, at 5). It, however, made no findings that Ms. Maldonado had committed any misconduct, even though that was at least half of the reason that the circuit court cited for dismissing the case. Nor did it affirm any finding that plaintiff's counsel had committed any misconduct.

But contrary to suggestions in some of Ford's briefs, the Court of Appeals did not affirm the circuit court's finding that the plaintiff or her counsel had committed any misconduct. The Court explicitly noted that both the plaintiff and her counsel contended that their speech was protected by the First Amendment (Ford Apx, Ex B, Ct App Op, at 5). Apart from recognizing that and briefly discussing that claim, however, the Court does not make any findings on that point at all.

As for the plaintiff's attorneys, the Court of Appeals correctly held that speech by attorneys could be regulated more closely than that of non-attorneys (Ford Apx, Ex B, Ct App Op, at 5-6), but recognized as well that those regulations had to be "narrow and

necessary" (Ford Apx, Ex B, Ct App Op, at 6). The Court did not find that any statement or act of plaintiff's attorneys violated Rule 3.6 because it "created a substantial likelihood of materially prejudicing an adjudicative proceeding." Instead, it found that it could not tell whether the public dissemination of Bennett's conviction by plaintiff and her attorneys" had "prevented defendants from receiving a fair trial on the ground that the jury pool was tainted." (Ford Apx, Ex B, Ct App Op, at 6). Because it was not clear whether there was any prejudice—or whether there were any less drastic alternatives to cure any prejudice that existed—the Court of Appeals remanded the matter for hearing by the circuit court (Ford Apx, Ex B, Ct App Op, at 6). As the Court of Appeals made clear, the remand hearing was to determine whether the conduct of the plaintiff or her attorneys had violated the *Gentile* "substantial likelihood" test (Ford Apx, Ex B, Ct App Op, at 7).

The Court of Appeals majority declared that it did not fully decide the constitutional issues raised by the plaintiff and the amici. But it found that the trial court "never issued an explicit order—written or oral stating what speech was limited" and that it had therefore dismissed the case "...under an unconstitutionally vague standard that conflicts with the due process requirements set forth in *Gentile v State Bar of Nevada*, 501 US 1030 (1991)." (Ford Apx, Ex B, Ct App Op, at 6 n 3).

In concurring with the decision to remand this matter, Judge Helene White held as follows:

> I agree that a circuit court has authority to impose sanctions for misconduct of a party or an attorney. Under the circumstances that no order was violated, no hearing was held regarding the motivations of plaintiff or plaintiff's counsel, and no hearing was held to determine whether the jury pool was in fact tainted, I agree that the circuit court abused is discretion in dismissing the case.
>
> (Ford Apx, Ex B, Ct App Op, White, J, concurring, at 1).

Judge White, however, held that there should be no hearing on remand because the requisite record had not been made at the time and two years had passed since the case had been dismissed (Ford Apx, Ex B, Ct App Op, White, J, concurring, at 1).

I

THE COURT SHOULD NOT REVIEW OR REVERSE THE COURT OF APPEALS BECAUSE NEITHER THE PLAINTIFF NOR HER ATTORNEYS COMMITTED ANY ACT OF MISCONDUCT.

A. In dismissing this case on the basis of speech by the plaintiff, the circuit court violated the First Amendment because the plaintiff did nothing other than exercise her Constitutional and statutory rights to speak publicly on a matter of obvious public concern.

In the leading case of *Bridges v State of California*, 314 US 252 (1941), the United States Supreme Court directly held that a party in a pending legal case has a First Amendment right to make statements to the media about the conditions that gave rise to his case and the trial judge's conduct of that case.

As is abundantly clear from the facts set forth above, Justine Maldonado did nothing other than exercise her Constitutional right—and her statutory right[5]—to speak out publicly about the intolerable working conditions that she and others faced at the Wixom plant and about the manner in which she believed the Wayne County Circuit Court was enforcing the civil rights statutes. Even a brief examination of *Bridges* and the cases that followed it show that the circuit court badly erred in finding that anything Maldonado said or did constituted a basis for dismissing her case.

In *Bridges*, a Los Angeles Superior Court presided over a dispute between two unions as to which would represent the longshoremen in that city's port. The trial court

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[5] Under the National Labor Relations Act, Maldonado had a right to speak, petition, and leaflet in non-work areas and non-work times about the wages, hours and working conditions at the Wixom plant. 29 USC ss. 157, 158(a)(1).

found the president of one of the unions in contempt on the basis that he had released to the media, while the case was pending, his telegram to the United States Secretary of Labor claiming that the judge's rulings were violating the National Labor Relations Act and that if they were not "reversed" the union would "tie up the West Coast."

In reversing the contempt conviction, the United States Supreme Court began by holding that neither the trial court nor the California Supreme Court should have judged the case by applying the standards of the common law of contempt. Rejecting arguments like those Ford advances here as to the "inherent authority" of the courts, the Supreme Court held that the First Amendment had decisively modified the common-law authority of the courts and that lower courts must decide disputes over speech involving pending cases on the basis of the law of the First Amendment, construing that amendment "...as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." *Bridges,* 314 US at 263.

In words that are equally applicable to the labor controversy at issue in *Bridges* and the civil rights dispute at issue here, the Supreme Court then underscored the fundamental interests that are served by debate over the issues raised in pending legal cases. As the Court held, public interest in important issues "is much more likely to be kindled" by a controversial legal case than by a "generalization, however penetrating, of the historian or scientist." *Id.*, 314 US at 268. Attempts to ban speech about pending legal cases thus fell at the "precise time when public interest in the matters discussed would naturally be at its height," and on those cases that raised "the most important topics of discussion." *Id.*, 314 US at 268-269.

The *Bridges* Court thus concluded that speech by parties about pending legal cases could only be banned if there was a clear and imminent danger that the speech would cause the unfair administration of justice, which, it held, the telegram at issue did not do. *Id.*, 314 US at 271, 276-278.

Almost forty years later, a unanimous United States Supreme Court held that the state could not prosecute a newspaper under a state statute making it a misdemeanor to publish information about a confidential record of that state's judicial tenure commission. *Landmark Communications, Inc. v Virginia*, 435 US 829 (1978). Citing *Bridges* and the cases that followed it, the Court set forth the guiding principle for judging cases where the state attempted to penalize speech about pending legal cases:

> What emerges from these cases is the working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.
>
> *Landmark*, 435 US at 845 (Burger, C.J), citing *Bridges*, 314 US at 194.[6]

The Supreme Court has set an even higher standard for punishing persons for making comments about matters that are part of the *public* record of a case. In striking down the misdemeanor conviction of a reporter who published the name of a rape victim in violation of a Georgia statute that prohibited that act, the Court, for example, acknowledged the privacy interest at stake, but held that that interest clearly had to yield to the public's right to the free publication and discussion of matters of public record:

> Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting

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[6] As will be discussed in the next section, the United States Supreme Court has relaxed the *Bridges* standard somewhat insofar as the state attempts to regulate speech *by attorneys* about pending cases. *See Gentile v State Bar of Nevada*, 501 US 1030 (1991). But it has *never* changed that standard insofar as speech by parties, witnesses, and members of the public are concerned.

> of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business. *In preserving that form of government the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection.*
>
> *Cox Broadcasting Corp v Cohn*, 420 US 469, 496 (1975)(emphasis added).

As *Cohn* and *Cox* make clear, *if* the Michigan expungement statute, MCL 780.623(5), were construed generally to prohibit or punish speech about a misdemeanor conviction that was entered in open court—or an expungement order that was entered in an equally public proceeding—it would be unconstitutional.[7]

As far as plaintiff is aware, the courts have sustained only one type of restriction upon speech by parties about pending cases. In extraordinary cases that have received vastly more publicity than is or will be present here, the federal courts of appeals have held that the trial courts may, *if there are no other alternatives*, issue *on a prospective basis* specific and narrowly-tailored orders prohibiting a party from speaking on specified subjects to the media. See, e.g., *United States v Ford*, 830 F 2d 596, 598-600 (CA 6 1987); *United States v Brown*, 218 F 3d 415 (CA 5 2000), *cert den* 531 US 1111 (2001). But no federal court—and no state court of record—has *ever* held that a trial judge may levy ex post facto *punishment* on a party based on a party's speech about a case, about the facts that gave rise to the case, or, most especially, about a matter that is already a part of the public record of that case.

Yet that absolutely unprecedented step is precisely what the circuit court did here.

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[7] If, however, it were construed as a restriction on the release of information by court personnel, it would be constitutional.

In support of that unprecedented decision, the circuit court declared that Maldonado could be punished because she testified in her deposition that she had told a hundred people about Bennett's conviction, that she would not "shut up" about it because Bennett is a "menace and must be stopped," and that she would post the facts about Bennett on the Internet if she knew how to do so (Ford Apx, Ex B, Cir Ct Op, at 3-4). The Court further found that Maldonado could be punished because she had attended a demonstration, where others passed out a leaflet setting forth Bennett's conviction and the circuit court's ruling on that conviction. Finally, the circuit court found that she could be punished because she declared on television that she would not "stop fighting sexual harassment" even if the judge did try to dismiss her case (Ford Apx, Ex B, Cir Ct Op, at 5-6).

The circuit court declared that all this violated Rule 3.6 of the Michigan Rules of Professional Conduct (Ford Apx, Ex B, Cir Ct. Op, at 6-7). But as Ms. Maldonado is not an attorney, those Rules obviously do not apply to her—and indeed, there is no reason for imposing upon her a duty even to know that those Rules exist.

But even if Maldonado knew that those Rules existed—and even if she guessed that the judge would be unhappy if she spoke out—she had a Constitutionally protected right to discuss Bennett's actions—and the response to those actions by Ford, by the 35th District Court and by the Third Circuit Court. As the information and the rulings were part of the public record, there neither was, nor could there be, a finding that her restatement of those public facts or her view of them created a clear and present danger to any legitimate interest that the State might have. If Mr. Bridges had a Constitutionally protected right to discuss the way in which he believed the California courts were

infringing the rights of his union, Ms. Maldonado had a Constitutionally protected right to discuss the way in which she believed that the Third Circuit Court was violating her civil rights.

In fact, if anything, Ms. Maldonado's right to discuss the matters at issue are on a firmer foundation than were those of Mr. Bridges. Unlike the strike that Mr. Bridges predicted in his telegram to the Secretary of Labor, the facts that Ms. Maldonado (and her attorneys) discussed are, in every sense of the word, matters of public record—on file in the 35th District Court until November 2001 and in Wayne County Circuit Court, the Court of Appeals, and this Court thereafter. Those facts were also in the January 28, 2001, issue of the *New York Times*—which is accessible from every library in the state.

As the Supreme Court held in establishing the rights of litigants to discuss their cases at the time that the public is most interested in them, the First Amendment must be read "...as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." *Bridges,* 314 US at 263. In dismissing Maldonado's claim on the basis of speech and association by Maldonado that was clearly protected by the Constitution—and even more clearly in dismissing her claim based on her publication of "truthful information contained in official court records open to public inspection," *Cohn,* 420 US at 496—the circuit court violated the command of the First Amendment.

The Court of Appeals was discretely silent about the circuit court's finding that Maldonado had engaged in conduct and speech that warranted the punishment levied by the circuit court. As there is no basis whatever for that crucial aspect of the circuit court's ruling, this Court should summarily deny Ford's application for leave. It is apparent that the circuit punished speech that was protected by the First Amendment.

B. In dismissing this case on the basis of statements and actions of the plaintiff's attorneys, the circuit court violated the First Amendment because the statements and actions of the attorneys were protected by the First Amendment.

In *Gentile v State Bar of Nevada,* 501 US 1030 (1991), the Supreme Court balanced the rights of free speech and fair trial and held that comments to the media by attorneys about pending cases in which they were engaged were governed not by the standard set forth in *Bridges*, but could instead be proscribed if the "...lawyer knows or reasonably should know that [the statement] will have a substantial likelihood of materially prejudicing an adjudicative proceeding." *Gentile*, 501 US at 1061-1062.

As will be discussed below, the Court struck down the discipline imposed upon the attorney and found that the Nevada Bar Rule, which was identical to the Michigan Rule and the Comment associated with it, was unconstitutionally vague. Here too, the standard under which the case was dismissed was unconstitutionally vague, as the Court of Appeals found. But before addressing the validity of the Rule, this Court should dismiss the application for a simpler reason: The circuit court penalized the plaintiff for actions by her attorneys that were not covered by Rule 3.6 or were specifically protected by the safe harbor provisions of that Rule.

By its terms, Rule 3.6—and thus the circuit court's comments—do not cover *anything* other than certain "statements" by counsel that counsel knows or has reason to know may be "disseminated by means of public communication." The Rule does not apply to BAMN conferences, meetings held by members of Congress, meetings with the Chamber of Commerce, or any other meetings where the media are not present.[8]

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[8] There is on evidence that media representatives were present at the town hall meeting or the BAMN conference – nor were they present as far as counsel knows.

Nor does the Rule ban attorneys from providing public documents to media representatives—or from associating with or representing persons who publish statements that might run afoul of Rule 3.6 if the lawyer himself made those statements. Neither does it prohibit them from appearing in broadcasts or being quoted in newspapers where others make statements that, if made by an attorney, might form the basis for a claimed violation of Rule 3.6. Nor, finally, does Rule 3.6 ban attorneys from attending demonstrations where leaflets are distributed—or impose upon them a duty to attempt to dissuade the *Detroit Free Press* or the Justice for Justine Committee from publishing anything that either sees fit to publish.

These are not "semantic games," as Ford claims (Ford Reply Br, at 2). These are *constitutional* limits on the power of the government to ban speech and association—limits that were essential in Chief Justice Rehnquist's Opinion sustaining of the "substantial likelihood" standard set forth in *Gentile*. As the Chief Justice stated, the Rule "imposed *only narrow and necessary limitations on lawyers' speech*."—including, in particular, limits upon "(1) *comments* that are likely to influence the actual outcome of the case, and (2) *comments* that are likely to prejudice the jury venire..." *Gentile*, 501 US at 1075 (emphasis added). The majority made clear that the relaxed standard applied *only* to extrajudicial *statements* by attorneys *to representatives of the media*:

> Because lawyers have special access to information...their extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers' statements are likely to received as especially authoritative.
>
> *Id.*, at 1074.[9]

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[9] In *Gentile* itself, the attorneys' comments were at a press conference.

In asking this Court to sustain a decision that clearly attempts to penalize Ms. Maldonado for actions by her lawyers that are not statements to the media, Ford asks this Court to exceed the powers granted to it by the Constitution of the United States.

Insofar as Ford asks this Court to grant leave based on actual statements to the media by Ms. Maldonado's attorneys, it also asks this Court to exceed the bounds established by the Supreme Court. Preliminarily, Ford misstates the record when it asserts that in September 2001, the press release contained comments about "excluded evidence" (Ford App, at 5). At that time, there were no rulings on this evidence in the *McClements* and *Perez* cases—and, in fact, under the Court of Appeals rulings in *McClements*, the evidence will be admitted on her negligent retention claim. See *McClements v Ford Motor Company*, Ct App No. 243764, *lv. granted* Sup Ct No. 126276.

More fundamentally, Ford's cavalier attempt to convert Rule 3.6 into an all-purpose ban on comments by attorneys about excluded evidence ignores the very specific limits in the Rule and the Comments to it. The Michigan Rule contains no list of presumptively prohibited or permitted subjects. The Comments, however, declares that counsel should not "*ordinarily*" comment upon the criminal record of a party or upon evidence that counsel has reason to believe will be excluded from the trial—but then specifically states that *notwithstanding any other provision of the Rule*, counsel *have the right* to make public statements in three specific situations of direct relevance to this case:

> (b) Notwithstanding Rule 3.6 and paragraphs (a)(1)-(5) of this portion of the comment, a lawyer involved in the investigation or litigation of a matter may state without elaboration:
> (1) the general nature of the claim or defense;
> (2) the information contained in a public record;
> (3) the scheduling or result of any step in litigation.

Comment, Michigan Rule 3.6, Michigan Rules of Professional Conduct[10]

As is obvious, the drafters of this Comment intended to shelter the key areas of speech by lawyers that the Supreme Court had identified as protected. If lawyers are to inform the public, they must be able to state the general nature of the claim or defense, the contents of public records, and the scheduling or results of any step in the litigation. In fact, as the Supreme Court held in *Cohn*, the First and Fourteenth Amendments do not permit the state to penalize persons for statements of fact about public proceedings. Indeed, banning such statements could not serve a compelling state purpose because the information is, by definition, already in the public domain.

The September 11, 2001 press release falls squarely in the middle of these safe harbors. It sets forth facts that were in the public record, statements of the plaintiff's claims, and the results of prior steps in the instant litigation. It was, moreover, issued at a time when no jury was sitting or expected to sit at any time in reasonable proximity to that press release.

As to the alleged statements of plaintiff's counsel about the conviction after the May 17, 2002 hearing, counsel does not recall making any such statements and they do not appear in the media reports on that date. Nevertheless, *if* plaintiff's counsel made public statements about Bennett's conviction following the May 17 hearing,[11] those statements were completely protected for they did no more than set forth what was said in

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[10] The Maryland Court of Appeals has given the most thorough consideration to the scope and nature of these safe harbors. *Attorney Grievance Commission v Gansler*, 377 Md 656, 835 A2d 548 (2003). That discussion confirms that the Rule does not ban statements like the September 11 press release or the May comments by counsel.

[11] Other than unsworn representations by Bennett's counsel, there is no evidence as to what plaintiff's counsel said to the media about this evidence in May 2002 (Ford Apx, Ex M, Tr. 7/8/2002, 94).

the motions and briefs that counsel had filed on repeated occasions. There was no substantial likelihood of prejudice, both because trial was still two months away and because the media had free access to the information in any event.

As set forth below in Argument II, the circuit court's decision violates numerous fundamental protections for free speech. But this Court need not even reach those issues because, as shown above, neither Maldonado nor her attorneys did anything other than engage in speech that was protected by the First Amendment and that was neither proscribed by nor subject to proscription by Rule 3.6 or any other Rule.

C. In dismissing the plaintiff's action based in part on speech by third parties, the circuit court violated the plaintiff's rights to free speech and free association.

In *Nebraska Press Association v Stuart*, 427 US 539 (1976), the United States Supreme Court reversed a decision by the Supreme Court of Nebraska that had sustained as modified an order issued by a trial court presiding over a sensational murder trial in a small rural community. The Court held that the Nebraska court violated the First Amendment by maintaining an order that prohibited the media and others present in the courtroom from publishing any information relating to the "existence and nature of any confessions by the defendant," or to "admissions made [by the defendant] to third parties," or any other facts "strongly implicative" of the defendant's guilt.

The Court struck down the order as an unlawful prior restraint on speech and added that "[t]ruthful reports of public judicial proceedings have [also] been afforded special protection against subsequent punishment." *Nebraska Press Association*, 427 US at 559, citing *Cohn* and *Craig v Harney*, 331 US 367 (1947).

As there are no facts in the leaflets by the Justice for Justine Committee that were not part of open court proceedings or records, the circuit court had no authority to restrain the Justice for Justine Committee or to punish its members for distributing the fliers in question.

The circuit court claimed that it could do so anyway, because, it said, Attorney Masley was supposedly responsible for those leaflets under the claimed authority of MRPC 8.4(a) which provides that an attorney shall not "knowingly assist or induce another [to violate the Rules of Professional Conduct] or [to violate the Rules of Professional Conduct] through the acts of another" (Ford Apx, Ex B, Cir Ct Op, 8, citing MRPC 8.4.

But Rule 3.6 prohibits statements to the media *by attorneys*, and assisting the Justice for Justine Committee—which did not occur—would not in any event be assisting it in violating a bar rule.

More fundamentally, Ms. Maldonado's attorneys did *not* give any assistance to the Justice for Justine Committee in the publication of the leaflets in question. On six occasions, Ms. Maldonado's attorneys stated to the court that they had not written, published or distributed the leaflets—or encouraged others to do so (Ford Apx, Ex M, Tr 7/8/2003, 98, 102, 111-113, 115). At the hearing before Judge Giovan, the attorneys for Ford grudgingly admitted that they had no evidence to the contrary (Ford Apx, Ex M, Tr 7/8/2002, 113).[12]

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[12] In this Court, the defendants have *grossly misrepresented the record* by suggesting that Ms. Masley "...conceded that neither she nor the Plaintiff could exclude the possibility that they had participated in the distribution of the leaflet at the Ford World Headquarters." Apart from the fact that "not excluding the possibility" is not evidence that anyone did anything, Ms. Masley's answer set forth on those pages does

The "evidence" that Ford offers to link the attorneys to the leaflets consists of "well-documented" web sites, agendas from conferences, and newspaper articles that establish that the plaintiff's attorneys have represented the By Any Means Necessary Coalition, spoken at its conferences, or been said to be among its "national organizers" (Ford Reply Br, at 3-4 n. 5). Without any support whatsoever, Ford then asserts that BAMN is "now called the Justice for Justine Committee" (Ford App, at 9).

According to Ford, because plaintiff's attorneys have a ongoing relationship with BAMN and BAMN is supposedly connected to the Justice for Justine Committee, the attorneys are responsible for violating Rule 3.6 for every leaflet passed out by the Justice for Justine Committee even if they had nothing to do with that leaflet and even if it contained no statement by any attorney.

If that were the law, Thurgood Marshall would have been disbarred long before he became a Supreme Court Justice, because he was connected to the NAACP which was connected to Dr. Martin Luther King and he in turn was connected with people who committed real and imagined violations of existing law in cities across the South.

But it is obviously not the law. On repeated occasions in widely varying contexts, the United States Supreme Court has held that a person may not be punished because he was associated with a group, a boycott, a strike, or other form of concerted activity merely because persons whom he knew or with whom he had associated had engaged in acts that were said to be unlawful. See, e.g., *NAACP v Claiborne Hardware*, 458 US 886, 918-920 (1982).

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not express anything other than uncertainty as to what Ms. Maldonado did (Ford Reply Br, at 2, citing Ford Apx, Ex H, Tr. 7/8/2002, 110-111).

Still less can a person be held liable because persons whom he knew or with whom he had associated exercised their own First Amendment right to produce or a distribute a leaflet. Even less can an attorney be held responsible because she failed to talk others out of exercising their First Amendment rights.

This would be almost comical but for the fact that it is precisely one of the bases upon which the circuit court dismissed Ms. Maldonado's case:

> But the Justice for Justine Committee, the ostensible authors of the material, seem to be intimately connected with the plaintiff, having appeared with her and her attorneys at multiple court sessions. At a minimum, neither the plaintiff nor any of her counsel have ever suggested that they have attempted to dissuade them from distributing circulars that highlight evidence ruled inadmissible by two judges.
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> (Ford Apx, Ex B, Cir Ct Op, at 8).

The Court of Appeals properly reversed the circuit court's decision in this case—for the circuit court simply departed from the Constitution of the United States.

II.

THE COURT SHOULD DENY FORD'S APPLICATION FOR LEAVE TO APPEAL BECAUSE THE CIRCUIT COURT FAILED TO APPLY THE PROCEDURES MANDATED BY THE CONSTITUTION FOR THE REGULATION OF SPEECH.

A. Before issuing its comments suggesting restraints on speech, the circuit court failed to find that there was a clear and present danger to the rights of a fair trial and a lack or any other alternative.

In *CBS, Inc. v Young*, 522 F 2d 234 (CA 6 1975) and *United States v Ford*, 830 F 2d 596 (CA 6 1987), the United States Court of Appeals for the Sixth Circuit refused to issue restraining orders prohibiting comments by attorneys and parties in, respectively, a case challenging the shooting deaths of the students at Kent State University and a prosecution of a black Congressman from Tennessee.

The Sixth Circuit held that the courts should issue such order only in the rarest circumstances because speech by parties went to the "heart" of our system of civil liberty:

> Trial judges, the government, the lawyers, and the public must tolerate robust and at times acrimonious or even silly public debate about litigation. The courts are public institutions funded with public revenues for the purpose of resolving public disputes, and the right of publicity concerning their operations goes to the heart of their function under our system of civil liberty.
>
> *United States v Ford*, 830 F 2d 596, 598 (CA 6 1987).

The Circuit held that a criminal defendant had a "First Amendment right to reply publicly to the prosecutor's charges, and the public has a right to hear that reply because of its ongoing concern for the integrity of the criminal justices system..." *Id.* Those rights could only be restrained after a hearing in which the proponent of the order established by competent evidence a "clear showing that an exercise of First Amendment rights will interfere with the rights of the parties to a fair trial" and that there were no reasonable alternatives to issuing an order restricting their speech. *Id.*, at 598, citing *CBS*, 522 F 2d at 241.

The circuits are deeply split on whether the proponent must establish a clear and present danger or a substantial likelihood of prejudice in order to obtain such an order. See *United States v Brown*, 218 F 3d 415, 427-428 (CA 5 2000). But the federal circuits are unanimous in holding that the court must conduct an evidentiary hearing, must make specific findings as to the requisite degree of danger, and must find that there are no reasonable alternatives to issuing the gag order. *Ford*, 830 F2d at 600; *Brown*, 218 F 3d at 424-425.

The circuit court here did not hold a hearing, did not enter a finding, or did not consider any alternatives. Indeed, it never had a motion before it—and never issued an order or even a "ruling" setting forth the obligations that it was imposing.

As the circuit court's June 21 comments do not meet the fundamental prerequisites for restraining the speech of the parties or of their attorneys, the dismissal sanction it later levied is void *ab initio*.

B. The circuit court issued an impermissibly vague order.

The federal courts of appeals have also been unanimous in requiring that orders restraining speech by parties or their attorneys be "couched in the narrowest terms that will accomplish the pin-pointed objectives permitted by constitutional mandate. *Ford*, 830 F 2d at 600. As the Fifth Circuit held, "A restraining order of any type is unconstitutionally vague if it fails to give clear guidance regarding the type of speech that an individual may not utter." *Brown*, 218 F 3d at 430.

As the Court of Appeals found, the circuit court here plainly and obviously did not meet that obligation. It did not issue a written order. It never made clear to whom its comments applied. And it did not even attempt to specify the subjects upon which counsel could not comment or the circumstances in which that ban applied.

At best, the circuit court referred to the obligations of an attorney under Rule 3.6. But the United States Supreme Court struck down a Nevada Bar Rule that was identical to Rule 3.6 and the Comments to it precisely because the safe harbor provisions of that Rule were unconstitutionally vague:

> A lawyer seeking to avail himself of [Nevada] Rule 177(3)'s protection must guess at its contours. The right to explain the "general" nature of the defense without "elaboration" provides insufficient guidance because "general" and "elaboration" are classic terms of degree. In the context before us, these terms

> have no settled usage or tradition of interpretation in law. The lawyer has no principle for determining when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated.
>
> *Gentile*, 501 US at 1048-1049 (Kennedy, J).

As Justice O'Connor stated in her decisive concurring opinion, the Rule fails to give "fair notice to those that it intended to deter" and creates the "possibility of discriminatory enforcement" because it is so vague. *Gentile*, 501 US at 1081 (O'Connor, J, concurring).

If anything, the Michigan Rule was vaguer than the Nevada Rule struck down in Gentile, because the Comments to the Michigan Rule were offered only for "guidance." Thus, the ambiguities in the definitions of both prohibited and permitted subjects was compounded by the fact that the attorney had no way to determine whether those definitions were or were not authoritative guides to action.

If the circuit court had held a hearing and the requisite showing was made, it could have issued an order that cleared up the ambiguities. By short circuiting the entire procedure, however, the circuit court made that impossible. It issued a vague comment, that failed to give fair notice and that plainly opened the door to discriminatory enforcement in which plaintiff was severely punished for being present at a demonstration—while Mr. Bennett's attorney was not punished at all for calling all of the women liars in the Metro Times.

The Court of Appeals was obviously correct in finding that the circuit court dismissed this case under an unconstitutionally vague standard—and there is no reason whatever to review that finding.

But the Court of Appeals did err on one matter. If the court's June 21 comments were an unconstitutionally vague standard—which they obviously were—then the

punishment levied under that standard is void. *Gentile*, 501 US at 1048-1051, 1082. There is no need for a remand for a hearing on prejudice—because there is no way that the circuit court can retroactively cure the vagueness of the standard that it announced on June 21. This Court should modify the order and simply remand this case for trial.

C. The circuit court levied an unconstitutional retroactive punishment upon speech.

The Supreme Court has repeatedly condemned prior restraints upon freedom of speech and press. See, e.g., *Nebraska Press Association*, 427 US at 555-563. But as Justice Black wrote in *Bridges*, the retroactive imposition of contempt citations on litigants who speak publicly about their cases is in some ways *worse* than a prior restraint:

> ...it would follow as a practical result of the decisions below that anyone who might wish to give public expression to his views on a pending case involving no matter what problem of public interest, just at the time his audience would be most receptive, would be as effectively discouraged as if a deliberate statutory scheme of censorship had been adopted. Indeed, perhaps more so, because under a legislative specification of the particular kinds of expressions prohibited and the circumstances under which the prohibitions are to operate, the speaker or publisher might at least have an authoritative guide to the permissible scope of comment, instead of being compelled to act at the peril that judges might find in an utterance a 'reasonable tendency' to obstruct justice in a pending case.
>
> *Bridges*, 314 US at 269.

What the circuit court did here is far worse than what the California superior court did in *Bridges*. If the circuit court's decision had been allowed to stand, a litigant or her attorney in the Michigan courts would have been required to brave not only a contempt citation—but the dismissal of the case—in order to speak about a myriad of issues that are of vital public interest.

Because the decision below penalizes speech that is protected—and violates virtually every procedural protection for speech that has ever been announced—there is absolutely no legal support for it whatever. Not a single reported case from a single jurisdiction has ever upheld the dismissal of a civil case because the trial court retroactively determined that an attorney or a litigant had violated Rule 3.6 or any similar rule.

As *Nebraska Press, Ford, Brown* and similar cases make clear, a trial court has many means to assure that litigants receive a fair trial, including delay, change of venue, voir dire, and, in rare cases, restraining orders on speech. In an appropriate case, this Court may wish to address those remedies. But there is no reason for this Court to address an approach that openly violates repeated decisions of the Supreme Court and that tramples under foot vital Constitutional protections.

This Court should deny leave on the application, modifying the remand to eliminate the hearing so that this matter is simply remanded for trial.

III.

THE COURT SHOULD DENY THE APPLICATION FOR LEAVE TO APPEAL BECAUSE THE TRIAL COURT MAY NOT DISMISS AN ACTION BASED ON PUBLIC STATEMENTS BY THE PLAINTIFF OR HER ATTORNEYS WITHOUT ATTEMPTING TO DETERMINE WHETHER THERE HAD BEEN ANY PREJUDICE AND WHETHER THERE WERE ANY LESS RESTRICTIVE ALTERNATIVES.

As *Ford, Brown* and other cases upholding pretrial restraints upon speech have held, a trial court may not issue such an order without determining whether prejudice would result without it and, if so, whether there are any less restrictive alternatives to prevent that prejudice. Among the less restrictive alternatives that the courts have held

must be considered are postponements, change of venue, searching voir dire, and similar measures. *Ford,* 830 F2d at 599; *Brown,* 218 F2d at 430-431.

In determining whether there has been any prejudice from pretrial publicity far more massive than any at stake in this case, this Court has repeatedly held that the trial court should not even grant a change of venue without attempting to determine through voir dire whether it is possible to select a fair jury. See, e.g., *People v Jendrzejewski*, 455 Mich 495, 517 (1997).

The circuit court, however, took a step far more drastic than a pretrial restraining order or a change of venue without any attempt to determine whether there had been any prejudice or whether there were any less restrictive means to cure that prejudice. The circuit court summarily dismissed the case, stating that it would presume that prejudice had occurred (Ford Apx, Ex B, Cir Ct Op, at 11-12).

This holding, too, directly violates *Ford, Brown* and numerous similar authorities.

Ford has attempted to defend it by claiming that there was "intransigent, premeditated, and flagrantly abusive misconduct" that there was no other alternative (Ford App, at 1). But if the misconduct was so intransigent, why did Ford not notice it until it filed its motion to dismiss on June 28, 2002? And if the prejudice was so serious, why did Ford never file a motion asking for a restraining order, a postponement, a change of venue, special voir dire, or anything else? As is so often the case, Ford's argument is one of convenience.

But that argument will not wash. In repeated cases, the federal courts have rejected motions to dismiss indictments where United States Attorneys and the Federal Bureau of Investigation have orchestrated media campaigns against defendants charged

with serious federal crimes. Noting that none of the defendants had requested a change of venue, a postponement or special voir dire, the Seventh Circuit quickly rejected such a motion:

> As a remedy [for the government engineered publicity], the defendants request that their indictments be dismissed. We find, however, that the defendants have failed to show prejudice, and this failure is fatal to their arguments.
>
> *United States v Sanford*, 589 F 2d 285, 298 (CA 7 1978), *cert den* 440 US 983 (1979).

The Eighth Circuit was similarly curt:

> The second motion for dismissal of the indictment raises the more serious allegation that much of the prejudicial publicity was government-engendered and the appellants suggest that a showing of actual prejudice is unnecessary under such circumstances. We disagree.
>
> *United States v Civella*, 648 F 2d 1167, 1173 (CA 8 1981), *cert den* 454 US 867 (1981).

If that is the requirement where the aggrieved party's liberty is at stake and where the offending party is the government—which is held to a far higher standard than a plaintiff's attorney—then it is abundantly clear that the circuit court's summary decision dismissing this case is utterly without foundation.

As Ford conceded in its initial application, it would be "virtually impossible" for it to show prejudice here (Ford App, 34). As that was clear in 2002—and is obvious today—this Court should spare the parties of the hearing to determine prejudice that cannot possibly be proved by summarily ordering that this matter be remanded for trial.

CONCLUSION

For the reasons stated above, the plaintiff asks this Court to deny the application for leave to appeal as to the issue of pretrial publicity and to remand this matter for trial

on the merits without the hearing mandated by the decision of the majority of the Court of Appeals. For the reasons stated in the plaintiff's July 1, 2004, Brief in Opposition to the Defendant-Appellant's Application for Leave to Appeal, the plaintiff asks this Court to deny as well the application for leave as to the evidence issues decided by the Court of Appeals. The plaintiff further asks this Court to grant her cross application for leave to appeal for the reasons set forth in the July 1 brief.

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